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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES LEONARD and WILLIAM SHARROCKS,
Petitioners,

-against-

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE UNITED STATES OF AMERICA,

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OPINION BELOW

The order of the Court of Appeals appears in the appendix hereto at p. 1a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 26th, 1981. This petition for certiorari is being filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The Fifth Amendment to the United States Constitution states as follows:

> "AMENDMENT V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compeled in any criminal case to be a witness against himself; nor shall private property be taken for public use, without just compensation."

QUESTIONS PRESENTED

1. Whether the material variance between the indictment and the government's proof at trial, coupled with the misleading nature of a supplemental instruction given by the district court, deprived petitioners of their constitutional rights to a fair trial and due process of law?

2. Whether the district court improperly considered, in imposing sentence upon petitioner Sharrocks, his failure to cooperate with the authorities in derogation of petitioner's Fifth Amendment privilege against self-incrimination?

The petitioners James Leonard and William Sharrocks respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on January 26th, 1981.

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STATEMENT OF THE CASE

The indictment in the case at bar charged sixteen named defendants, including petitioners, as well as approximately seventy unindicted co-conspirators, with a far-flung narcotics conspiracy and various substantive offenses. According to the government, the conspiracy embraced a period from approximately January of 1970 through April of 1979 and included the unlawful importation and distribution of marijuana, hashish and cocaine. Prior to trial, several defendants entered pleas of guilty and agreed to cooperate with the government. Petitioners James Leonard and William Sharrocks proceeded to trial with six other defendants. The government's evidence was voluminous and extremely complex. Its seven principal witnesses each testified to a myriad of individual transactions, not only among and between the named defendants, but involving most, if not all, of the seventy unindicted co-conspirators as well.

From the outset of trial through its conclusion almost two and one-half months later, defense counsel concertedly and vehemently challenged the validity of the all-encompassing conspiracy espoused by the government. Defense counsel contended that the government's proof failed to establish the single conspiracy charged in the indictment, but revealed instead a number of discrete, unrelated conspiracies. The district court ultimately ruled that this determination should be made by the jury.

At the conclusion of the trial, the district court included a multiple conspiracy instruction in its charge to the jury. After lengthy deliberations, however, the jury requested further clarification of the procedure to be followed for identifying the conspiracy charged in the indictment in relation to other separate conspiracies. At that juncture, the district court gave a supplemental instruction upon this issue to which defense counsel duly objected.

REASONS FOR GRANTING THE WRIT

THE CORRECTNESS OF THE DECISION BELOW IS OPEN TO SERIOUS QUESTION

A. The Material Variance Between the Indictment and the Government's Proof at Trial, Coupled With the Misleading Nature of a Supplemental Instruction Given by the District Court, Deprived Petitioners of their Constitutional Rights to a Fair Trial and Due Process of Law.

Petitioners Leonard and Sharrocks respectfully contend that, contrary to the reasoning of the court below, the material variance between the indictment and the government's proof at trial, coupled with the misleading nature of a supplemental instruction* given by the district court,

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* In its supplemental instruction, the court stated:

"Now, in responding to this note, I remind you that what I say here does not supersede my previous instructions.

In specific answer to your inquiry, I instruct you that to identify one of the assumed multiple conspiracies as the conspiracy charged in Count 1, you must finc that the purpose or object of that conspiracy was identical, in whole or in part, with one or more of the purposes or objects spelled out in Paragraphs 1 through 7 of Count 1. In other words, to find that the conspiracy charged in Count 1 existed, it is not necessary to find that all of its purposes or objects were accomplished. I remind you that a conspiracy may be found to exist even though the conspirators wholly failed to carry out its purposes or objects. Thus, if you find beyond a reasonable doubt, from the evidence, that an identifiable group of conspirators did unite their efforts and took steps to carry out any one or more of the purposes or objects spelled out in Paragraphs 1 through 7 of

resulted in substantial prejudice which deprived them of their constitutional rights to a fair trial and due process of

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Footnote continued from preceding page

Count 1, then, however limited their participation or their success, the criminal offense has been committed.

You will recall that certain witnesses for the Government testified to meetings, discussions, and actions they undertook with one another to import and deal in hashish, marijuana and cocaine. If you believe their testimony beyond a reasonable doubt, you may find that some of the purposes and objects of the conspiracy charged in Count 1 were accomplished.

You may also justifiably find that some of the acts and transactions involved different actors, times and places and a different substance; in which event, you might conclude that that was a separate and distinct conspiracy from the one charged in Count 1.

The basic question before you is whether any of the defendants on trial here, by their own statements as heard by witnesses, or actions observed by witnesses, were knowing participants in the accomplishment or attempt to accomplish any of the purposes or objects of the conspiracy charged in Count 1. If the evidence does not satisfy you beyond a reasonable doubt of a defendant's participation in such a conspiracy, you must acquit that defendant on that charge. If, on the other hand, you are satisfied beyond a reasonable doubt, by a defendant's statements and actions, that he did kowingly join with acknowledged conspirators in importing or dealing hashish, marijuana or cocaine, you must convict that defendant unless you believe that his actions, if any, related to group activity so separated in time, composition of personnel, or substance involved as to warrant the belief that it was unrelated to the transactions of the acknowledged conspirators; in other words, a separate conspiracy not fairly embraced within the conspiracy charged in Count 1.

As I have previously instructed you, if you find that a defendant was involved solely with a separate conspiracy not charged in Count 1, then you must acquit him. Bear in

law. The prejudice stemmed directly from the fact that the proof adduced by the government conclusively established numerous discrete conspiracies rather than the single conspiracy charged in the indictment.

The difficulties engendered by this material variance culminated in serious confusion experienced by the jury during its lengthy deliberations in its efforts to identify respective conspiracies and to determine their interrelationships. Petitioners assert that the supplemental instruction of the district court, given in response to these inquiries, was vague, misleading and wholly failed to provide the jury with concrete guidelines for its most critical fact-finding determination--namely, the individual accountability of a particular defendant with regard to the conspiracy charged.

In support of the instant petition, petitioners respectfully submit that the question presented is one of great importance. It cannot be disputed that courts have become increasingly aware of the dangers inherent in the government's reckless misuse of the single conspiracy indictment format for the sake of convenience. This Court is urged to grant review in the case at bar in order to halt this practice by reaffirming the safeguards enunciated in *Kotteakos v. United States,* 327 U.S. 750 (1946).

Footnote continued from preceding page

mind, however, that a defendant may be a member of a separate conspiracy not charged in the indictment and also one that is." (A714-716)

B. The District Court Improperly Considered, in Imposing Sentence Upon Petitioner Sharrocks, His Failure to Cooperate With the Authorities in Derogation of Petitioner's Fifth Amendment Privilege Against Self-Incrimination.

This Court is likewise urged to grant review in the instant case upon the grounds that the district court misconceived and misapplied this Court's recent holding in *Roberts v. United States,* 100 S. Ct. 1358 (1980). Here, unlike *Roberts,* petitioner Sharrocks' claim of privilege was made in a timely fashion and asserted unequivocally in conjunction with the exercise of another constitutional right—the right to appeal. The district court's understanding that *Roberts, supra,* sanctioned its consideration of petitioner's failure to cooperate in imposing sentence was erroneous and penalized petitioner Sharrocks for the valid exercise of a basic constitutional right, a result universally condemned by this Court. The predominance of the Fifth Amendment in the constitutional scheme requires an authoritative response from this Court upon this basis as well.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX "A" OPINION

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the twenty-sixth day of January, One Thousand nine hundred and eighty-one.

PRESENT:
HON. J. EDWARD LUMBARD
HON. ELLSWORTH VAN GRAAFEILAND
HON. AMALYA L. KEARSE
Circuit Judges

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES LEONARD, WILLIAM SHARROCKS,

Defendants,

JAMES LEONARD, WILLIAM SHARROCKS,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was agued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO
Clerk

By: s/Edward J. Guardaro
Deputy Clerk

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.